UOB Venture Investments Ltd v Tong Garden Holdings Pte Ltd and Another [2000] SGHC 240

Case Number : MA 185/2000, 186/2000

Decision Date : 20 November 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Han Ming Kuan (Deputy Public Prosecutor) for the appellant.; Tan Kim Chiang (Angela Wong & Co) for the respondents.

Parties : UOB Venture Investments Ltd — Tong Garden Holdings Pte Ltd; and Others

: This was an appeal by the Public Prosecutor against the sentences imposed by the district judge in the court below.

The two respondents each pleaded guilty to one charge of abetting, in furtherance of the common intention of both of them and one Lye Ai Ling, one Yang Yan Zhi to commit cheating by personation, to wit, by assuming the identity of Lye Ai Ling for the purpose of attempting to deceive a police constable attached to the Singapore Airport Terminal Services (`SATS`) to allow Yang Yan Zhi to board an airline flight bound for Osaka; which offence was punishable under s 109 read with s 419 read with s 34 of the Penal Code (Cap. 224).

The sentence prescribed for the offence was a term of imprisonment of up to three years or fine or both. The district judge imposed a fine of $4,000 on each of the respondents, which fines have since been paid. After hearing both parties, I allowed the appeals and sentenced each respondent to imprisonment for a term of one month and a fine of $2,000. Accordingly, I ordered that a sum of $2,000 be refunded to each of the respondents. I now give my reasons in writing.

The facts

According to the statement of facts which was admitted to without qualification, Mazlan bin Mahmoud, a police constable attached to the Singapore Auxiliary Terminal Services security services, conducted a check on three People`s Republic of China (`PRC`) nationals, including the above-mentioned Yang Yan Zhi, at Changi International Airport Terminal 2, Gatehold Room E4 on 3 June 2000 at about 11.30pm. He discovered that the boarding passes produced by the three PRC nationals did not match their names. Yang Yan Zhi produced a boarding pass which bore the name of Lye Ai Ling in an attempt to assume her identity. In addition, the three PRC nationals were found in possession of forged Japanese passports.

Investigations revealed that the respondents, who were sisters, aged 24 and 33 years respectively, were recruited as agents and worked under the instructions of one Ng Ling Ling to source for persons who were willing to provide their names to apply for airline tickets. They received a sum of $150 from Ng Ling Ling for each name that they obtained.

Pursuant to this, on 2 June 2000, Lye Ai Ling provided the first respondent with her particulars so that the latter could apply for an air ticket for flight SQ 986 bound for Osaka, Japan. The next day, the second respondent met Lye Ai Ling to check in the air ticket at the Singapore Airlines Ticketing Centre at Orchard Paragon Centre. For allowing her particulars to be used, Lye Ai Ling received a sum of $100 from the second respondent. Both the respondents were aware that the air ticket and boarding pass would be used to enable an illegal immigrant to travel on a forged passport to Osaka,

Japan.

The accomplice, Lye Ai Ling, had earlier pleaded guilty to an offence of abetment to commit cheating by personation for her role in this incident and was fined $2,000. Ng Ling Ling remains at large.

The decision below

The district judge sentenced each respondent to a fine of $4,000, in default eight weeks` imprisonment. In sentencing the respondents, he took into account their clean records; the plea of guilt; the mitigation plea; their minimal role in the scheme; and the fact that they would have been sufficiently deterred by the nine days spent in remand.

The appeal

The prosecution appealed against the sentences imposed and contended that a custodial sentence was warranted for an offence of this nature. The DPP submitted that the district judge erred in finding that the respondents played a minor role in the scheme. He also contended that the district judge placed undue weight on the mitigating factors as well as the sentence imposed on the accomplice, Lye Ai Ling.

Whether custodial sentence should be imposed

The primary issue in this appeal was whether a custodial sentence should have been imposed on the respondents. What was the approach to be adopted by the sentencing court when determining the appropriate sentencing option in any particular case?

In this regard, I found it useful to refer to my previous decision in **PP v Tan Fook Sum** [1999] 2 SLR 523 where, after discussing the content and impact of the sentencing principles of retribution, deterrence, prevention and rehabilitation, I noted (at [para] 21):

> *The difficulty caused by the multiplicity of operative principles is that it makes conflicts inevitable. A complicating factor is that the principles have to be applied not only in determining which of several options made available by the legislature is the suitable punishment but also in determining whether a number of options can be combined together. ... Moreover, after the proper option has been determined, it seems the foregoing principles must again be applied in order to ascertain what the amount of fine or the term of imprisonment should be. In the view of Tan Yock Lin, there is a better way:*
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> ***`... what will facilitate more rational and informed sentencing is recognition that there is a dichotomy between public interest and aggravating or mitigating factors. Generally speaking, only the public interest should affect the type of sentence to be imposed while only aggravating or mitigating circumstances affect the duration or severity of the sentence imposed.`***
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> ***In my opinion, this approach may usefully be adopted here.*** *[Emphasis added.]*

That case involved an offence of wilfully endangering the safety of an aircraft, commonly known as `air rage`. There, I applied Professor Tan Yock Lin`s approach and concluded that considerations of public interest and general deterrence called for the imposition of a substantial custodial sentence in addition to a fine as the offences were of a grave nature and in order to deter others from similarly endangering the safety of aircraft in flight. I subsequently approved of and applied this sentencing approach in **Chng Gim Huat v PP** [2000] 3 SLR 262 at [para] 106-107 where I held that a custodial sentence should be imposed for tax evasion offences as they were tantamount to a deliberate fraud on the State; affected the society as a whole and were often difficult to detect or to investigate. In that case, the public interest was again the critical factor in my decision.

I thus began by examining whether the considerations of public interest called for a custodial sentence. Upon reflection, I had no doubts that a custodial sentence was indeed warranted for offences of this nature. The respondents` conduct in effect, amounted to a fraud on the authorities and the SATS officers, who would not have issued the boarding pass, nor allowed the PRC national to proceed to the airport terminal gatehold room, had they been aware of her true identity and intent. Further, by providing the air ticket and boarding pass issued in the name of a bona fide Singapore citizen, the respondents would have effectively assisted the illegal migrant to evade detection as well as her attempt to leave Singapore illegally. The offence was particularly grave as it assisted the illegal immigrant in circumventing Singapore`s strict immigration laws. It was evident from the admitted facts that the respondents knew that the air ticket and boarding pass were to be used by an illegal immigrant to travel to Osaka, Japan, on a forged passport. In this respect, I also noted that Parliament has, in s 57(1)(ii) Immigration Act (Cap 133), prescribed a minimum custodial sentence of six months for the analogous offence of abetting a person to leave Singapore in contravention of the provisions or the regulations of the Immigration Act. This reflects the seriousness with which offences of such nature are viewed by the legislature.

The commission of such offences would not be possible without the active procurement and assistance on the part of the respondents and their accomplices. The nature of the offence was undeniably serious, particularly in light of domestic and global efforts to combat organised illegal migration. If allowed to fester, such activities could have detrimental repercussions on Singapore`s standing in the international community and the integrity of its anti-illegal migration policies. In the long run, the proliferation of such illegal activities involving the use of boarding passes issued in the name of Singapore citizens would also cast a shadow over other bona fide Singapore travellers.

It is pertinent to note that custodial sentences have been imposed in previous cases involving offences of a similar nature. For instance, in the case of **Yong Siew Soon & Anor v PP** [1992] 2 SLR 933 which was cited by the DPP, the appellants pleaded guilty to two charges of abetting the cheating of an auxilliary police officer by the presentation of boarding passes in assumed names, punishable under s 109 read with s 417 of the Penal Code. A similar third charge was taken into consideration. That offence was punishable with up to one year`s imprisonment, or fine, or both; which was a less severe punishment than the charges faced by the respondents in this case. There, the first appellant had merely introduced two Chinese nationals to the second appellant in order for the latter to arrange for them to enter the USA with false passports. The second appellant procured the false passports, purchased airline tickets and obtained boarding passes in their assumed names. The Chinese nationals then presented the boarding passes in the assumed names in order to board the flight but were discovered.

The appeal was heard before me. In that case, I had agreed that the offences called for a deterrent sentence and that a fine would not be appropriate. Consequently, I upheld the sentence of two months` imprisonment imposed against the first appellant on each of the charges. The second

appellant was sentenced to five months per charge. I was not persuaded that there were such differences between the circumstances which existed in that case and the present as to warrant a departure from the approach which was adopted in ***Yong Siew Soon & Anor v PP*** .

In the final analysis, it appeared to me that the district judge below had erred in failing to consider or to appreciate the factors adumbrated above. In the circumstances, I was of the view that the overwhelming public interests warranted the imposition of a custodial sentence in all cases which involve offences of this nature. A strong signal had to be sent out that such offences would not be tolerated and would be severely punished. This was necessary in order to effectively deter others from committing these offences. A fine would hardly be adequate, particularly since the offender stood to gain monetarily from such illegal activities.

The fact that the respondents were first offenders and had pleaded guilty were at best, neutral factors and could not justify the imposition of a fine when there were compelling overriding policy reasons for imposing a deterrent custodial sentence. In this regard, I fully agreed with the DPP`s submission that the district judge had placed excessive weight on the mitigating factors pleaded on behalf of the respondents.

Counsel for the respondents pointed out that the prosecution did not press for a deterrent sentence at the proceedings below. In my view, this was hardly a material consideration and I rejected the submission out of hand. While the prosecution ought to assist the court by pointing out the aggravating factors, the court was the ultimate guardian of the law and should assess the necessity of a deterrent sentence in an appropriate case, regardless of whether the parties have submitted on it. As I noted in **Meeran bin Mydin v PP** [1998] 2 SLR 522 at [para] 8-9:

> *A deterrent sentence is granted entirely within the court`s discretion. There is no requirement in law for the prosecution to apply for deterrence before a court may consider it in the exercise of its discretion. ... The court must direct its mind to the nature of the offence and the relevance of deterrence in arresting the offender`s criminal intent. ...*

Counsel for the respondents then contended that the district judge was correct in holding that the nine days spent in remand would have served as a sufficient deterrent. In essence, this argument relied on the `clang of the prison gates` principle applied by LP Thean J (as he then was) in **Siah Ooi Choe v PP** [1988] SLR 402 [1988] 2 MLJ 342 . Briefly, the principle states that in the case of a man with an unblemished record, the fact that he has a criminal conviction and finds himself in prison is a very grave punishment and a short prison term should in certain circumstances suffice.

In my view, this principle did not apply to the respondents; further, the facts here were not so exceptional or extenuating as to justify invoking this principle. To this end, I felt it necessary to reiterate my cautionary remark in **Yong Siew Soon v PP** [1992] 2 SLR 933 at p 935 that:

> *The `clang of the prison gates` principle should not be overstated, as has often been the case in Singapore. It merely contemplates a short prison sentence as being appropriate in certain circumstances, and its correct application must depend on the facts of each case - In **Siah Ooi Choe v PP**, the appellant was still sentenced to three months` imprisonment in the end. ...*

As I subsequently explained in **Tan Sai Tiang v PP** [2000] 1 SLR 439 at [para] 40:

> *... [the] principle is not that where first time offenders are concerned, the mere fact that a jail sentence has been imposed is punishment enough. The actual basis for the application of this principle is that the shame of going to prison is sufficient punishment for that particular person convicted. ... the convicted person must have been a person of eminence who had previously held an important position or was of high standing in society, In other words, it would hardly ever apply in most cases dealing with members of society who had never held an important post or were persons of sufficient standing in the eyes of society.*

In any case, even if I accepted that the period spent in remand may have had some effect in deterring the respondents as individuals, I would still have rejected counsel`s submission as the sentence imposed by the district judge would not have met the need for deterrence on a wider, more general level.

The appropriate sentence

I next turned to the question of the duration of the sentence to be imposed, bearing in mind the need for general deterrence as well as the need to impose a punishment which was commensurate with the seriousness of the offence. As I observed in **Xia Qin Lai v PP** [1999] 4 SLR 343 at [para] 29:

> *... the principle of deterrence (especially general deterrence) dictated that the length of the custodial sentence awarded had to be a not insubstantial one, in order to drive home the message to other like-minded persons that such offences will not be tolerated, but not so much as to be unjust in the circumstances of the case.*

In this case, the degree of the respondents` culpability was a material consideration. Although they were not the mastermind of the scheme, I was unable to agree with the district judge`s conclusion that they played only a minimal role. The respondents did not merely source for potential subjects. They followed it up by obtaining Lye Ai Ling`s particulars, purchasing the air ticket and assisting Lye Ai Ling in checking-in the air ticket. The second respondent was also responsible for paying Lye Ai Ling for allowing her particulars to be used. Taken in totality, their role could hardly be described as minimal. On the contrary, it shows quite clearly that they played a fairly active role in the entire scheme.

The admitted facts further revealed that the respondents were agents and worked under Ng Ling Ling`s instructions. Their involvement was not limited to a single one-off transaction but entailed the `recruitment` of persons who were willing to provide their names for the purpose of applying for airline tickets. This was done with the full knowledge that they would be used to enable illegal immigrants to leave the country using forged passports. According to their arrangement with Ng Ling Ling, they would receive $150 for each name obtained; the monetary rewards they stood to gain was thus potentially high, depending on the number of names they managed to procure. Yang Yan Zhi was apprehended at the airport together with two other PRC nationals who were similarly in possession of boarding passes which were not issued in their names. At the very minimum, there was sufficient material for this court to infer that the respondents had colluded with the activities of an organised criminal syndicate. This was an aggravating factor to be taken into account when determining the duration of the sentence.

It was unclear from the grounds of decision, as to how far the district judge took into account the fine of $2,000 imposed on the accomplice Lye Ai Ling. Apart from mentioning the fine in the enumeration of the facts, the district judge made no further reference to the sentence imposed on her. Viewed in that light, the DPP`s criticism that the district judge had relied on Lye Ai Ling`s sentence as a benchmark may perhaps go too far. On the other hand, the respondents` submission that the prosecution did not appeal against the sentence imposed on Lye Ai Ling was of no assistance. The mere fact that the prosecution did not appeal against her sentence did not necessarily mean that it was the correct sentence or that it would have been upheld on appeal. Counsel`s submission that the respondents may have been encouraged to plead guilty as they were influenced by the sentence imposed on Lye Ai Ling was wholly without merit. A plea of guilt depended primarily on the accused person`s assessment of the likelihood of conviction or acquittal at trial. The respondents would certainly not have been entitled to retract their plea simply because the actual sentence imposed did not accord with their expectations.

In determining the appropriate sentence, I was not inclined to be fettered by the sentence imposed on Lye Ai Ling. While consistency in sentencing was a desirable goal, it was not an overriding consideration since the sentences in similar cases may have been either too high or too low: **PP v Mok Ping Wuen Maurice** [1999] 1 SLR 138 at [para] 26, following **Yong Siew Soon v PP** [1992] 2 SLR 933 at p 936. In the first place, the respondents obviously played a more significant role in the scam as compared to Lye Ai Ling. Secondly, as I had pointed out in the earlier part of my judgment, a custodial sentence should be imposed in every case which involve offences of this nature.

In the proceedings before me, counsel for the respondents belaboured the point that no actual harm or loss was suffered by any party and that the respondents believed that they had not caused anyone to suffer. This argument was in my view, misconceived. When considerations of public interests were implicated, these factors were of less relevance or importance. The loss or damage sustained was of an intangible nature and the ultimate victim was the State. In any case, an act had in fact taken place in consequence of the abetment, the principal offence was not completed only due to the alertness of the SATS officer. The respondents were certainly not entitled to claim any credit for this.

In light of the foregoing, I agreed that the fines of $4,000 imposed by the district judge were manifestly inadequate. Accordingly, I enhanced the sentences imposed by the district judge by sentencing each respondent to imprisonment for a term of one month after taking into consideration the need for general deterrence, the time spent in remand, the extent of the respondents` culpability, their lack of antecedents and their plea of guilt. In light of the respondents` claim that they needed the money to finance their mother`s medical expenses, I also imposed a reduced fine of $2,000 on each of the respondents. As the respondent had already paid the fines which were imposed by the court below, I ordered that a sum of $2,000 be refunded to each of them.

Outcome:

Appeals allowed.